



The Comptroller General
of the United States

Washington, D.C. 20548

Cunningham

Decision

Corrected Copy

Matter of: Cumberland Sound Pilots Association--Request for
Reconsideration
File: B-229642.2
Date: June 14, 1988

DIGEST

1. The General Accounting Office will not question a contracting officer's good faith determination that the successful offeror meets solicitation requirements mandating that two of the contractor's employees have Coast Guard pilot licenses, since licenses were not required as condition to award, but rather were contract performance requirements and thus were not definitive responsibility standards.

2. A protester, who believed a protest issue had been decided to the protester's benefit at an informal General Accounting Office (GAO) conference on a protest, which caused it not to submit comments on the issue after the conference, was not prejudiced, where: (1) the conference was understood to be informal only; (2) the GAO attorney only requested the agency's opinion on a pure legal question and did not direct the protester to refrain from submitting comments on issue; and (3) the protester's arguments on the particular issue have now been fully considered and rejected incident to its reconsideration request.

DECISION

Cumberland Sound Pilots Association has requested that we reconsider our decision of March 29, 1988, which dismissed the company's protest against the award of a firm, fixed-price Navy contract to the St. Mary's Entrance Federal Pilots Association for vessel pilotage services for the submarine base at Kings Bay, Georgia, under request for proposals (RFP) No. N00612-87-R-K021.

We deny the request for reconsideration.

Cumberland protested that one of the two individuals whom St. Mary's intended to employ for performance on this contract did not meet, nor could the individual timely meet, the pilot licensing requirements of the RFP. As far as

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these allegations pertain to the protest, those requirements were that: (1) "the contractor shall employ on a full-time basis, at least two pilots with the qualifications specified," and (2) "the contractor's pilots shall hold a current Coast Guard License as a first class pilot with a route extension for the waters including the St. Mary's entrance channel to the Naval Submarine Base, Kings Bay, Ga. Harbor."

We concluded that Cumberland's protest essentially concerned the Navy's determination that St. Mary's was a responsible contractor, which we do not review, absent a showing that the finding was made fraudulently or in bad faith, or "definitive" responsibility criteria in the solicitation were not complied with by the successful bidder or offeror. Since Cumberland had not shown that any of the exceptions to our policy of not reviewing responsibility findings applied in this case, we dismissed the protest. We stated that where, as here, a solicitation requires the contractor to obtain a specific license, but does not indicate that the license must be obtained prior to award, the contractor may obtain the license after award. Under such circumstances, the licensing provisions are mere performance requirements and do not constitute definitive responsibility criteria.^{1/}

Cumberland argues that all solicitation provisions that require a specific license, such as the licensing provisions in question here, are definitive responsibility criteria. Cumberland contends that pilotage services were required at the beginning of the contract, which was only 3 days after the date of award, and that St. Mary's, which Cumberland alleges did not have a properly licensed pilot prior to award [could not meet contract obligations] with this pilot. Cumberland further argues that the "time within which a license must be obtained [either before or after award] is not relevant to the issue of whether such a requirement constitutes a definitive responsibility criterion," citing United Pacific Corp., B-221838, April 9, 1986, 86-1 CPD ¶ 353, where we held that the "general rule is that an IFB provision that requires a bidder to possess a specific license is a definitive responsibility criterion, compliance with which is a necessary prerequisite to award." (Emphasis supplied.)

^{1/} Definitive responsibility criteria are objective standards established by a contracting agency to measure a bidder's or an offeror's ability to perform the contract, as stated in certain specific qualitative and quantitative qualification requirements contained in a solicitation. W.H. Smith Hardware Co., B-228576, Feb. 4, 1988, 88-1 CPD ¶ 110.

We remain unpersuaded that the licensing requirements here constitute definitive responsibility criteria. If the license requirements in question do not require the bidder or offeror to possess a specific license before award, the licensing requirements cannot be considered definitive responsibility criteria, since the possession of a license cannot be considered to be a "necessary prerequisite to award" in these circumstances. See also S.A.F.E. Export Corp., B-213027, June 27, 1984, 84-1 CPD ¶ 675. That is, the employee licensing requirements here are contract performance requirements--not definitive responsibility criteria--since there was no RFP provision that required offerors to show prior to award that they had licenses. W.H. Smith Hardware Co., B-228576, Feb. 4, 1988, 88-1 CPD ¶ 110.

In any case, a Defense Contract Administrative Services Region (DCASR) representative performed a complete review of St. Mary's responsibility, including the ability of its pilots to meet these and other applicable licensing requirements. DCASR, in consultation with the Navy's operations officer, specifically found that the pilots St. Mary's planned on using met all applicable licensing requirements and so advised the contracting officer. Although it appears that this advice was erroneous, such that St. Mary's had to employ another pilot to meet contract requirements, the contracting officer's affirmative responsibility determination, based upon the specific assurances he received, was in good faith. Under the circumstances, our Office will not question the award.

Finally, Cumberland argues that "it was specifically agreed at the [GAO bid protest conference concerning this protest] that the license requirements were definitive responsibility criteria." Because of this "agreement," Cumberland says that it "did not discuss that issue in its comments" submitted to our Office after the conference to Cumberland's prejudice.

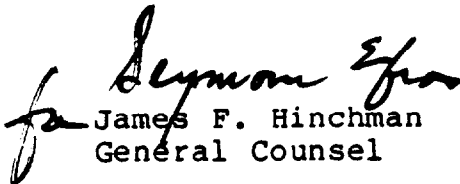
The conference in question was held under authority of 4 C.F.R. § 21.5 (1987), which did not provide for formal procedures such as transcripts, sworn testimony, or cross examination. Such a conference only provides a forum for an oral exchange of the parties. H.L. Carpenter Co.--Reconsideration, 65 Comp. Gen. 184, 86-1 CPD ¶ 3. That is,

bid protests to our Office prior to January 15, 1988, are decided on the basis of the written record. 4 C.F.R.

§ 21.3.2/

In any case, at the conference, the GAO attorney requested the contracting agency's opinion whether the licensing provisions were definitive responsibility criteria and did not direct Cumberland to refrain from submitting subsequent comments on this issue. Moreover, since whether or not these licensing provisions constitute definitive responsibility criteria is a pure legal question, our Office is not bound by the procuring agency's verbal opinion on this matter. Nevertheless, we have now fully considered and rejected Cumberland's arguments on this issue. Therefore, Cumberland was not prejudiced by the agency's statements that the licensing provisions constituted definitive responsibility criteria.

Accordingly, we deny Cumberland's request for reconsideration.


James F. Hinchman
General Counsel

2/ Effective for protests filed after January 15, 1988, "fact finding conferences" may be conducted pursuant to 4 C.F.R. § 21.5(b) (1988) to resolve a specific factual dispute essential to the resolution of the protest which cannot be otherwise resolved on the basis of the written record.